

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>MARVIN ROTHENBERG</b>	:	
for Redetermination of Deficiencies or for Refund of	:	DETERMINATION
Personal Income Taxes under Article 22 of the Tax Law	:	DTA NOS. 819008 AND
and the New York City Administrative Code for the	:	819164
Years 1998 and 1999.	:	

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Petitioner, Marvin Rothenberg, 73-27 Byron Avenue #3, Miami Beach, Florida 33141, filed petitions for redetermination of deficiencies or for refund of personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1998 and 1999.

On September 1, 2002 and September 6, 2002, respectively, petitioner, appearing *pro se*, and the Division of Taxation, appearing by Barbara G. Billet, Esq. (Margaret T. Neri, Esq., of counsel) consented to have the controversy determined on submission without a hearing. All documentary evidence and briefs were due to be submitted by February 21, 2003, which date began the six-month period for issuance of this determination. After due consideration of the record, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

## ***ISSUES***

I. Whether petitioner was domiciled in New York City during the years 1998 and 1999 and was therefore taxable as a New York State and City resident individual for the years at issue.

II. Whether petitioner maintained a permanent place of abode and spent more than 183 days in New York City during the years at issue and was therefore taxable as a New York State and City resident individual.

## ***FINDINGS OF FACT***

1. On August 6, 2001, the Division of Taxation (“Division”) issued to petitioner, Marvin Rothenberg, a Notice of Deficiency asserting total New York State and City personal income tax due of \$1,108.00, plus interest, for the tax year 1998.

2. On June 4, 2001, the Division had issued a Statement of Proposed Audit Changes to petitioner which explained the reasons for the adjustments made. The statement indicated as follows:

Interest income on obligations from any state other than New York State or any political subdivision of another state, though exempt from federal income tax, is taxable to New York [sections 612(b)(1) and 1303 of the New York State Tax Law]. Such income should have been reported on line 19 of the 1998 Form IT-201.

All or part of the income that was credited to your account or which you received from the mutual fund(s) shown below was derived from non-New York State and local obligations. Because you did not make the proper line 19 modification on your New York State return, we have adjusted your New York taxable income for the portion of non-New York interest income included in your distribution(s) from the mutual fund(s).

The information we have concerning the amount of state and local bond interest that you earned was obtained from your payer. Payers are required to report this data under section 658 of the New York State Tax Law. If you cannot reconcile this information with what was reported to you by your payer(s) or broker(s) on your 1998 year-end statements, you must contact your broker(s) for an explanation. We cannot adjust our billing without a statement from your payer(s)

identifying the amount, the fund, account number, cusip number and the percentage of each fund's portfolio that represents non-New York bond interest.

The statement indicated additional bond interest of \$9,854.00 which the Division added to petitioner's Federal adjusted gross income to increase petitioner's New York adjusted gross income. The increase resulted in the additional New York State and City personal income tax due as shown on the notice of deficiency issued for 1998.

3. On September 16, 2002, the Division issued to petitioner, Marvin Rothenberg, a Notice of Deficiency assessing total New York State and City personal income tax due of \$1,247.00, plus interest, for the tax year 1999.

4. On July 22, 2002, the Division had issued a Statement of Proposed Audit Changes to petitioner which explained the reasons for the adjustments made for the year 1999. The explanation was similar to that provided by the Division for the year 1998. The statement indicated additional bond interest of \$11,753.00 which was added to petitioner's Federal adjusted gross income to increase petitioner's New York adjusted gross income. The increase resulted in the additional New York State and City personal income tax due as shown on the notice of deficiency issued for 1999.

5. For the two years at issue, petitioner filed a timely New York State Resident Income Tax Return, Form IT-201, on which he indicated his address to be 3701 Shore Parkway, Brooklyn, New York. The address is a condominium owned by Mr. Rothenberg. This address was used by petitioner in correspondence dated November 11, 2002 with the Division of Tax Appeals. In a letter dated January 23, 2003 to the Division of Tax Appeals, petitioner indicated that he wished all future correspondence to be addressed to 73-27 Byron Avenue #3, Miami Beach, Florida.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 605(b)(1) sets forth the definition of a New York State resident individual for income tax purposes as follows:

Resident individual. A resident individual means an individual:

(A) who is domiciled in this state, unless (1) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state. . . , or

(B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States.

The definition of a New York City “resident” is identical to the State resident definition, except for the substitution of the term “city” for “state.” (*see* , Administrative Code of City of NY § 11-1705[b][1][A], [B]); *see also* 20 NYCRR 295.3[a]; 20 NYCRR Appendix 20, § 1-2[c]). The classification of resident versus nonresident is significant, since nonresidents are taxed only on their New York State or City (as relevant) source income, whereas residents are taxed on their income from all sources.

B. As set forth above, there are two bases upon which a taxpayer may be subjected to tax as a resident of New York, and both are at issue in this proceeding. The first, or domicile basis, for resident status turns largely on the concept of an individual’s “home.” The second, or “statutory” resident basis sets forth the dual predicates for resident tax status as (1) the maintenance of a permanent place of abode in the State and City and (2) physical presence in the State and City on more than 183 days during a given taxable year. The Division takes the position that petitioner was domiciled in New York City and thus was subject to tax as a resident of the State and City. The Division also asserts that petitioner spent in excess of 183 days in

New York City and maintained a permanent place of abode in the City and, thus even if not domiciled in New York City, remained subject to tax as a New York State and City statutory resident for the years 1998 and 1999.

C. Treated first is the issue of whether petitioner was a domiciliary of New York City. Neither the Tax Law nor the New York City Administrative Code contain a definition of domicile, but a definition is provided in the regulations of the New York State Department of Taxation and Finance (*see*, 20 NYCRR 105.20[d]). As relevant, it provides as follows:

*Domicile.* (1) Domicile, in general, is the place which an individual intends to be such individual's permanent home - - the place to which such individual intends to return whenever such individual may be absent.

(2) A domicile once established continues until the individual in question moves to a new location with the bona fide intention of making such individual's fixed and permanent home there. *No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time*; this rule applies even though the individual may have sold or disposed of such individual's former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, such individual's declarations will be given due weight, but they will not be conclusive if they are contradicted by such individual's conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that such individual did this merely to escape taxation in some other place.

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(4) A person can have only one domicile. *If a person has two or more homes, such person's domicile is the one which such person regards and uses as such person's permanent home.* In determining such person's intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. As pointed out in subdivision (a) of this section, a person who maintains a permanent place of abode in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though such person may be domiciled elsewhere. (Emphasis supplied.)

D. The test of intent with respect to a purported new domicile has been stated as "whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling

and permanent association with it” (*Matter of Bodfish v. Gallman*, 50 AD2d 457, 378 NYS2d 138, 140, *citing Matter of Bourne*, 181 Misc 238, 246, 41 NYS2d 336, 343; *affd* 267 App Div 876, 47 NYS2d 134). A taxpayer may change his or her domicile without severing all ties with New York State (*see, e.g., Matter of Sutton*, Tax Appeals Tribunal, October 11, 1990).

However, moves to other states in which permanent residences are established do not necessarily provide clear and convincing evidence of an intent to change one's domicile (*Matter of Zinn v. Tully*, 54 NY2d 713, 442 NYS2d 990). Only when coupled with the clear intent to change one's domicile does the fact of a changed residence become a true change of domicile. While certain declarations may evidence a change of domicile, such declarations are less persuasive than informal acts which demonstrate an individual's "general habit of life" (*see, Matter of Silverman*, Tax Appeals Tribunal, June 8, 1989, *citing Matter of Trowbridge*, 266 NY 283, 289).

E. While the standard is subjective, the courts and the Tax Appeals Tribunal have consistently looked to certain objective criteria to determine whether a taxpayer's general habits of living demonstrate a change of domicile. Among the factors that have been considered are: (1) the retention of a permanent place of abode in New York (*see, e.g., Matter of Gray v. Tax Appeals Tribunal*, 235 AD2d 641, 651 NYS2d 740, *confirming Matter of Gray*, Tax Appeals Tribunal, May 25, 1995; *Matter of Silverman, supra*); (2) continued business activity in New York (*Matter of Erdman*, Tax Appeals Tribunal, April 6, 1995; *Matter of Angelico*, Tax Appeals Tribunal, March 31, 1994); (3) family ties in New York (*Matter of Gray, supra; Matter of Buzzard*, Tax Appeals Tribunal, February 18, 1993, *confirmed* 205 AD2d 852, 613 NYS2d 294); (4) continuing social and community ties in New York (*Matter of Getz*, Tax Appeals

Tribunal, June 10, 1993); and (5) formal declarations of domicile (*Matter of Trowbridge, supra*; *Matter of Gray, supra*; *Matter of Getz, supra*).

F. A properly issued Notice of Deficiency is presumed to be correct and the taxpayer has the burden of demonstrating the incorrectness of such an assessment (*Matter of Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768, 589 NYS2d 383, *lv denied* 81 NY2d 704, 595 NYS2d 398; *Matter of Kourakos v. Tully*, 92 AD2d 1051, 461 NYS2d 540, *appeal dismissed* 59 NY2d 967, 466 NYS2d 1030, *lv denied* 60 NY2d 556, 468 NYS2d 467, *cert denied* 464 US 1070, 79 L Ed 2d 215; *Matter of Tivolacci v. State Tax Commn.*, 77 AD2d 759, 431 NYS2d 174). Tax Law § 689(e) provides that in any matter brought before the Division of Tax Appeals under Article 22 of the Tax Law, the burden of proof is upon the petitioner. Accordingly, it is necessary to ascertain whether petitioner has sustained his burden of proof in showing that he was not domiciled in New York City and did not maintain a permanent place of abode in New York City or spend in the aggregate more than 183 days in New York City during each of the years at issue.

G. In support of his position, petitioner submitted only an affidavit from an acquaintance who claimed that petitioner resided in Florida on a regular basis except for family visits to New Jersey, and a summary of electric usage for the condominium located in Brooklyn during the years at issue. The affidavit is contradicted by petitioner's use of the Brooklyn address on both his returns and in correspondence to the Division of Tax Appeals, as well as by the summary of electric usage which indicates that the condominium was being used during the years at issue. The summary of electric usage establishes little or nothing as to petitioner's intent with regard to his domicile or the amount of time spent in New York City or Florida during 1998 and 1999. Ultimately, there is no clear indication in the record that petitioner intended to sever his New

York ties, or that he possessed the requisite intent to make Florida his fixed and permanent home. In fact, the record contains no evidence to show any strong affinity on petitioner's part for making the focus of his life, i.e., his home, in Florida as opposed to New York. Therefore, it must be concluded that petitioner was a domiciliary of New York State and City during the years at issue.

H. Although the conclusion that petitioner was domiciled in New York City and State during the years in issue is determinative of whether petitioner is subject to tax as a resident individual for the years 1998 and 1999, for purposes of completeness, the issue of statutory residency will also be determined. Tax Law § 605(b)(1)(B) and New York City Administrative Code § 11-1705(b)(1)(B) set only two conditions which, if met, subject a nondomiciliary to tax as a resident. These conditions are maintenance of a permanent place of abode in the City and physical presence in the City on more than 183 days in any given year. Petitioner presented no evidence to attempt to meet his burden of establishing that he did not maintain a permanent place of abode in New York City or that he was in New York State and City less than 183 days during each of the years at issue. Accordingly, petitioner was properly subject to tax as a "statutory" resident of New York in each of such years.

I. The petitions of Marvin Rothenberg are hereby denied and the Division's notices of deficiency dated August 6, 2001 and September 16, 2002 are sustained.

DATED: Troy, New York  
August 7, 2003

/s/ Thomas C. Sacca  
ADMINISTRATIVE LAW JUDGE